

Tax Type: Sales Tax
Issue: Drive Away Decals

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| THE DEPARTMENT OF REVENUE |) | |
| OF THE STATE OF ILLINOIS |) | |
| |) | Docket No. 00-ST-0000 |
| v. |) | IBT # 0000-0000 |
| |) | NTL #00-0000000000000000 |
| ABC, INC. |) | |
| |) | |
| Taxpayer |) | |

Appearances: Jim Day, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Tad Armstrong of Armstrong Law Offices for ABC, Inc.

The Department of Revenue (“Department”) conducted an audit of ABC, Inc. (“taxpayer”) for the period of July 1, 1994 to December 31, 1996. The Department concluded that the taxpayer owed additional tax on various items and issued a Notice of Tax Liability, which was timely protested by the taxpayer. Both parties filed Motions for Summary Judgment with supporting briefs and a Joint Stipulation. After the motions were filed, the Department filed a Supplemental Memorandum of Law in which it conceded that a portion of the assessment should be dismissed. The remaining issues are the following: (1) whether the taxpayer owes Retailers’ Occupation Taxes for the sale of all terrain vehicles (“ATVs”) to Missouri residents; (2) whether the interest and penalty

should be abated; and (3) whether the taxpayer is entitled to attorney fees. For the following reasons, it is recommended that the penalty be abated and the remaining issues be resolved in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer's place of business is in Anywhere, Illinois. (Taxpayer's brief p. 2)

2. The taxpayer sold ATVs to Illinois and Missouri residents. (Taxpayer's brief p. 2)

3. The ATVs that were sold to Missouri residents were picked up by the customer at the taxpayer's place of business in Illinois. (Taxpayer's brief p. 2)

4. For each sale to a Missouri resident the taxpayer completed a Missouri application for title and license. The taxpayer gave the original application to each purchaser and sent a copy of the application to the State of Missouri. (Taxpayer's brief p. 2)

5. The taxpayer did not supply any of the Missouri purchasers with a driveaway decal. (Taxpayer's brief p. 2)

6. After the Department concluded its audit, the Department assessed the following taxes: (1) \$17,341.12 for Missouri ATVs; (2) \$2,863.16 for Illinois ATVs; (3) \$6,494.40 for GoKarts; (4) \$9,491.84 for Watercraft; and (5) \$306.35 for other items. (Taxpayer brief p. 1)

7. The Department concedes that the portion of the assessment concerning the Illinois ATVs should be dismissed. (Department's Supplemental Memo p. 1)

8. The taxpayer concedes that the portion of the assessment concerning the GoKarts, Watercraft, and other items should be upheld. (Taxpayer's brief p. 1)

CONCLUSIONS OF LAW:

The Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2. Section 2-5 of the ROTA lists some of the exemptions from the tax and provides in part as follows:

“Gross receipts from proceeds from the sale of the following tangible personal property are exempt from the tax imposed by this Act:

(25) A motor vehicle sold in this State to a nonresident even though the motor vehicle is delivered to the nonresident in this State, if the motor vehicle is not titled in this State, and if a driveaway decal permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the driveaway decal permit or having the out-of-state registration plates to be transferred is *prima facie* evidence that the motor vehicle will not be titled in this State.” (35 ILCS 120/2-5(25))

It is well-settled that tax exemption provisions are strictly construed in favor of taxation. Heller v. Fergus Ford, Inc., 59 Ill.2d 576, 579 (1975). The party claiming the exemption has the burden of clearly proving that it is entitled to the exemption, and all doubts are resolved in favor of taxation. Id.

The Department argues that in order to qualify for the exemption, the statute requires, *inter alia*, that either a driveaway decal be issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or that the nonresident purchaser have vehicle registration plates to transfer to the motor vehicle upon returning to his home state. The Department states that in this case the taxpayer did not issue driveaway decals, and the taxpayer has not alleged that the nonresident purchasers had out-of-state

registration plates to transfer to the vehicles upon returning to their home state. The Department simply contends that without either of these requirements, the taxpayer is not entitled to the exemption.

The taxpayer argues that the only requirement for the exemption is that the vehicle not be titled in this State. The taxpayer contends that the fact that the statute allows decals and transfer plates as *prima facie* evidence does not preclude other types of evidence to prove that the vehicle was titled outside of Illinois. The taxpayer claims that the decals and plates are not a requirement for the exemption; they are merely a form of acceptable evidence. The taxpayer states that there is no requirement that the taxpayer prove that the vehicle will be titled in another state, but simply that the vehicle will not be titled in this state. Because the Missouri residents will not title their ATV's in Illinois, the taxpayer claims that these vehicles meet the exemption requirements.

The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature. Board of Trustees of Southern Illinois University v. Department of Human Rights, 159 Ill.2d 206, 211 (1994). In order to determine the legislature's intent, the first step is to consider the plain and ordinary meaning of the language of the statute. Thomas v. Greer, 143 Ill.2d 271, 278 (1991).

The taxpayer's arguments are not persuasive because they disregard the word "and" in the statute. Section 2-5(25) exempts a motor vehicle "if the motor vehicle is not titled in this State, **and** if a driveaway decal permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state." (emphasis added, 35 ILCS 120/2-5(25)) The statute clearly requires either a

decal or transfer plates in addition to the motor vehicle not being titled in this State. The fact that the statute adds that the decal and plates are *prima facie* evidence that the vehicle will not be titled in this State emphasizes that the Department has the burden of overcoming this evidence if it is presented by the taxpayer. It does not indicate, as the taxpayer argues, that the decal or plates are not required. To find otherwise would render the word “and” meaningless.

The taxpayer argues that the issuance of a driveaway decal is not a requirement for the exemption because it would defeat the purpose of the exemption and would be an absurd requirement. The taxpayer claims that a decal is issued only to allow a non-Illinois purchaser to drive a vehicle to his or her home state. Because an ATV cannot be driven on the highways and cannot be driven from Illinois to Missouri, the taxpayer contends that it is absurd to issue a driveaway decal to an ATV. The taxpayer claims that the exemption was intended to allow Illinois dealers to sell to out-of-state residents at a competitive price and to allow the non-residents to avoid the fear of being taxed twice. The taxpayer argues that if the ATV will not be titled in Illinois, then it was intended to be exempt.

The exemption provision applies only to those motor vehicles that may receive either the driveaway decal or transfer plates because the provision specifically requires either a decal or transfer plates in addition to the vehicle not being titled in this State. The taxpayer admits that driveaway decals were not intended to be given to ATVs.¹ If

¹ This conclusion is supported by the statute. The exemption provision specifically refers to section 3-603 of the Vehicle Code, which indicates that the purpose of the decal is to provide for the operation of the vehicle from the place of sale to the place of destination outside of Illinois. (See 625 ILCS 5/3-603) Because ATVs cannot be operated on roadways from Illinois to Missouri, the purpose of the driveaway decal cannot be served by issuing it to an ATV. Although ATVs may be driven on public highways in limited circumstances (see 625 ILCS 5/11-1426), those circumstances do not allow for the operation of an ATV on roadways from Illinois to Missouri.

ATVs are not the type of vehicle that can receive decals or transfer plates, then ATVs are not the type of vehicle intended to be exempt under section 2-5(25). To find otherwise would render the provision concerning the decals and transfer plates meaningless. It would also be contrary to the rule that exemption provisions are to be strictly construed, and all doubts are to be resolved in favor of taxation. (See Heller at 579.) If ATVs are not the type of motor vehicle intended to be exempt under section 2-5(25), then ATVs are tangible personal property to which ROT applies.

The Illinois cases relied upon by the taxpayer for the contention that ATVs are the type of vehicle exempt under section 2-5(25) are distinguishable. In People v. Martinez, 296 Ill.App.3d 330 (2nd Dist. 1998), the court found that an ATV was a “motor vehicle” under the Illinois Vehicle Code for purposes of determining whether a defendant could be convicted for driving with a suspended license. In Roberts v. Country Mutual Insurance Company, 231 Ill.App.3d 713 (3rd Dist. 1992), the court found that an ATV was a “motor vehicle” for purposes of the uninsured motorist statute. Those cases are distinguishable because neither one of those cases concerned the exemption provision that is at issue in this case. Because the exemption provision requires either a decal or transfer plates, the term “motor vehicle” has a narrower meaning than it does in the Vehicle Code.

Finally, the taxpayer has asked for an abatement of the interest and penalty, plus attorney fees. An agency only has authority given to it by the legislature through the statute. Davis v. Chicago Police Board, 268 Ill.App.3d 851, 856 (1st Dist. 1994). Because there is no statutory authority to abate the interest or award attorney fees, it cannot be recommended that the interest be abated or attorney fees be awarded. The penalty, however, may be abated if the taxpayer establishes "reasonable cause" for the

failure to pay the taxes. (35 ILCS 735/3-8) In this case, the confusion concerning the exemption provision is a sufficient basis for abating the penalty.

Recommendation:

For the foregoing reasons, it is recommended that the Department's Motion for Summary Judgment be granted and the taxpayer's Motion for Summary Judgment be denied. It is further recommended that the portion of the assessment concerning Illinois ATVs be dismissed and the penalty be abated. The remaining amount of the assessment should be upheld, including interest. The taxpayer is not entitled to attorney fees.

Linda Olivero
Administrative Law Judge

Enter: June 15, 2001